

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 12029

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COMMISSIONERS:

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Edward McGaffigan, Jr.
Jeffrey S. Merrifield
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In the Matter of
DAVID GEISEN

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Docket No. IA-05-052

CLI-06-19

MEMORANDUM AND ORDER

The NRC Staff has filed with the Commission a petition for interlocutory review of a Licensing Board order¹ denying the Staff's motion to hold this enforcement proceeding in abeyance pending the outcome of a parallel criminal proceeding against Mr. David Geisen.² We deny the Staff's petition and affirm LBP-06-13.

BACKGROUND

This proceeding stems from the NRC Staff's enforcement order immediately suspending Mr. Geisen from performing any work in the nuclear industry for five years.³ The Staff based its Enforcement Order on the finding that Mr. Geisen had engaged in deliberate misconduct by deliberately providing information that he knew was not complete or accurate in all material

¹ LBP-06-13, 63 NRC ____ (May 19, 2006).

² NRC Staff's Petition for Interlocutory Review of Board's Denial of Motion to Hold the Proceeding in Abeyance and for a Stay Pending Review (May 31, 2006) ("Staff's Petition"). As the pleading's title indicates, the NRC Staff simultaneously sought to stay the effectiveness of LBP-06-13. Today's decision renders the Staff's motion moot.

³ See David Geisen; Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately), 71 Fed. Reg. 2571 (Jan. 17, 2006) ("Enforcement Order").

respects to the NRC, a violation of 10 C.F.R. § 50.5(a)(2).⁴ Mr. Geisen timely requested a hearing on the enforcement order, a request the Board granted.⁵

At the same time that the NRC was conducting its investigation and considering enforcement action, the United States Department of Justice (“DOJ”) was investigating criminal charges against Mr. Geisen, based on the same set of facts as those underlying the Staff’s Enforcement Order. On January 19, 2006, DOJ obtained a felony indictment of Mr. Geisen from a Federal Grand Jury in the United States District Court for the Northern District of Ohio.⁶ The indictment charged Mr. Geisen with concealing material information from the NRC and providing the NRC with false documents -- crimes similar to the regulatory violations alleged in the Enforcement Order.

Given the similarity of the enforcement and criminal proceedings, DOJ asked the NRC Staff to request that the Board hold the enforcement case in abeyance, pending the conclusion of the criminal case. DOJ provided an affidavit from Mr. Thomas T. Ballantine (an attorney on DOJ’s litigation team prosecuting Mr. Geisen) to support the requested motion.⁷ The Staff filed the motion and affidavit, and the Board subsequently heard oral argument on the matter. On May 19, 2006, the Board issued LBP-06-13, denying the Staff’s motion. The Staff submitted a Petition for Interlocutory Review of that order, Mr. Geisen filed a brief opposing the Staff’s Petition, and the Staff then replied to Mr. Geisen’s brief.

⁴ *Id.* at 2575.

⁵ Unpublished Memorandum and Order Summarizing Conference Call (Granting All Hearing Requests, Setting Oral Argument on Staff’s Abeyance Motion, and Addressing Related Matters), ADAMS Accession No. ML060860339, at 2 (March 27, 2006) (“March 27 Order”). (“ADAMS” is the acronym for the NRC’s Agencywide Documents Access and Management System -- a computerized storage and retrieval system for NRC documents, publicly accessible through the NRC’s web page at <http://www.nrc.gov>.)

⁶ *United States v. David Geisen, et al.*, Indictment, Case No. 3:06CR712 (N.D. Ohio Jan. 19, 2006), attached to Staff’s Petition.

⁷ Affidavit of Thomas T. Ballantine, Trial Attorney (March 20, 2006) (“Ballantine Affidavit”), attached to Staff’s Petition.

DISCUSSION

The question whether to hold an NRC enforcement proceeding in abeyance pending a related criminal prosecution is generally suitable for interlocutory Commission review because, unlike most interlocutory questions, the abeyance issue cannot await the end of the proceeding (it becomes moot).⁸ Hence we will consider the NRC Staff's petition for interlocutory review. But, "consistent with our usual deference to boards' fact-based decisions,"⁹ we see no reason in the record before us to disturb the Board's carefully-reasoned decision against holding this proceeding in abeyance. Like the Board, we consider this case to be quite different from our recent decision in the *Siemaszko* enforcement proceeding, where we affirmed the Board's decision holding the proceeding in abeyance.¹⁰ We believe the *Geisen* Board was correct in finding that the harm to Mr. Geisen from delay outweighs the harm to DOJ from moving forward.¹¹

I. Harm to Mr. Geisen if the Motion for Abeyance is Granted

First, we consider how an abeyance order could harm Mr. Geisen, and how his potential harm differs from Mr. Siemaszko's. The answers are straightforward. Mr. Siemaszko's Enforcement Order was not immediately effective.¹² Mr. Geisen's was, and he lost his job as a direct result. Our regulations require that hearings regarding immediately effective enforcement orders be held expeditiously.¹³

⁸ See, e.g., *Andrew Siemaszko*, CLI-06-12, 63 NRC ____, ____, slip op. at 4 (May 3, 2006); *Oncology Services Corp.*, CLI-93-13, 37 NRC 419, 420-21 (1993).

⁹ See *Siemaszko*, 63 NRC at ____ & n.14, slip op. at 5 & n.14.

¹⁰ *Id.*, 63 NRC at ____, slip op. at 13.

¹¹ The legal standards governing hearing delays were extensively discussed by the board below. See LBP-06-13, 63 NRC at ____, slip op. at 8-21. As such, we need not repeat them here.

¹² *Id.*, 63 NRC at ____ n.5, slip op. at 2 n.5.

¹³ 10 C.F.R. § 2.202(c)(1).

Unlike Mr. Geisen, Mr. Siemaszko himself conceded that he was “effectively unemployable” in the nuclear industry due to his indictment by a Federal Grand Jury;¹⁴ Mr. Siemaszko lost his job before issuance of the enforcement order of which he was the target.¹⁵ By contrast, the Board noted that Mr. Geisen has been assured that his most recent nuclear employer would welcome the opportunity to discuss re-employment if the Commission’s Enforcement Order is lifted.¹⁶ This employment-related assurance came nearly a month *after* the Grand Jury Indictment, yet the assurance was premised solely on the lifting of the Commission’s Enforcement Order, not on Mr. Geisen’s winning the criminal proceeding. Hence, a direct causal nexus exists between the Enforcement Order and Mr. Geisen’s firing – a nexus not present in Mr. Siemaszko’s situation.

For these reasons, we agree with the Board that Mr. Geisen has a strong argument regarding harm from a delay of the enforcement proceeding -- a key issue in any abeyance ruling in an NRC enforcement proceeding.¹⁷

II. Harm to DOJ if the Motion for Abeyance is Denied

DOJ’s series of affidavits in *Siemaszko* -- from Thomas Ballantine, a DOJ prosecutor -- offered factual justifications for concluding that continuation of the NRC enforcement adjudication could at least arguably jeopardize the criminal proceeding¹⁸ -- a second key factor in any abeyance ruling in an NRC enforcement proceeding.¹⁹ By contrast, Mr. Ballantine’s single affidavit in *Geisen* does not include supporting facts -- which, as we noted in *Siemaszko*,

¹⁴ *Siemaszko*, 63 NRC at ___, slip op. at 5, 10.

¹⁵ *Id.*, 63 NRC at ___, slip op. at 10.

¹⁶ LBP-06-13, 63 NRC at ___, slip op. at 3-4 & 36-37, citing a February 16, 2006 letter to Mr. Geisen from an official at Dominion Energy Kewaunee.

¹⁷ *Siemaszko*, 63 NRC at ___, ___-___, slip op. at 4, 9-11; *Oncology Services Corp.*, CLI-93-17, 38 NRC 44, 49-50, 59-60 (1993).

¹⁸ *Siemaszko*, 63 NRC at ___, slip op. at 8.

¹⁹ *Id.*, 63 NRC at ___, ___-___, slip op. at 4, 7-9 (reason for delay); *Oncology*, CLI-93-17, 38 NRC at 49, 53-57.

are essential in justifying an abeyance request.²⁰ Instead, the affidavit contains generalities, e.g., references to “the interests of justice”²¹ and concerns about possible circumvention of the more “restrictive rules of criminal discovery”²² and possible witness intimidation.²³ Were this level of generality sufficient to justify abeyance, then enforcement targets could never successfully oppose abeyance motions by the NRC Staff.

Given the Memorandum of Understanding (“MOU”) between the NRC and DOJ regarding the potential need to hold our enforcement proceedings in abeyance pending the conclusion of DOJ’s parallel criminal cases,²⁴ we are generally inclined to accommodate DOJ’s abeyance requests – and indeed we have recently done just that in *Siemaszko*.²⁵ But our MOU does *not* specify an ironclad guarantee of such accommodation. The MOU reflects a clear understanding (reiterated in our recent *Siemaszko* decision) that DOJ must provide factual justification for delaying our own adjudicatory process²⁶ and for imposing on the enforcement target the additional financial, professional, emotional, and other burdens that perforce

²⁰ *Siemaszko*, 63 NRC at ___, slip op. at 8: “[T]he weight to be given the Staff’s reason for seeking an abeyance turns on the quality of the *factual* record – i.e., DOJ’s . . . affidavits supporting this and earlier delays.” (Emphasis in original.)

²¹ Ballantine Affidavit at 2 ¶ 6.

²² *Id.* See also *id.* at 2 ¶ 7, referring generally to the possibility that Mr. Geisen will exercise his Constitutional right against self-incrimination, and that this exercise would give him “a lopsided discovery advantage.”

²³ Ballantine Affidavit at 2 ¶ 6: “witnesses . . . can be compelled to appear for administrative depositions . . . [which] compulsion . . . may be intimidating to witnesses who expect to testify at criminal trials.”

²⁴ Memorandum of Understanding Between the Nuclear Regulatory Commission and the Department of Justice, 53 Fed. Reg. 50,317, 50,318 (§ II) (Dec. 14, 1988).

²⁵ *Siemaszko*, 63 NRC at ___, slip op. at 9: “We do not lightly second-guess DOJ’s views on whether, and how, premature disclosure might affect its criminal prosecutions.”

²⁶ *Siemaszko*, 63 NRC at ___, slip op. at 7: “The Staff, as the party supporting abeyance (and therefore carrying the burden of proof), must make at least *some* showing of potential detrimental effect on the criminal case.” (Emphasis in original; footnotes omitted.)

accompany a delay in the resolution of an enforcement proceeding.²⁷ Indeed, the MOU expressly calls on DOJ to provide the NRC Staff with factual support for an abeyance request -- with "appropriate affidavits or testimony."²⁸

Despite our general willingness to accommodate DOJ, the circumstances and facts of this case provide us no basis to approve DOJ's request (through the Staff) for an abeyance order. Notwithstanding the Board's repeated and very direct pre-hearing comments on the lack of sufficient factual detail in the Ballantine Affidavit,²⁹ DOJ did not submit a second, more detailed affidavit. Nor did Mr. Ballantine accept the Board's invitation to attend the oral argument hearing to provide further factual details to support the assertions in his affidavit.³⁰ As a result, the NRC Staff (representing DOJ's interests) was unable to respond to the Board's questions at oral argument with the level of specificity sought by the Board.

Lacking the required factual support for DOJ's abeyance request, we, like the Board, have no choice but to reject the Staff's and DOJ's position on abeyance. We therefore uphold LBP-06-13. If, at a later point in the enforcement proceeding, the NRC Staff (at DOJ's behest) presents the Board with specific claims of harm to the ongoing criminal proceeding, the Board is free to reconsider the abeyance question.

²⁷ See LBP-06-13, 63 NRC at ___, ___, n.117, ___, slip op. at 2 (referring to Mr. Geisen's loss of his chosen profession, and his forced use of retirement savings to start a less-remunerative business that requires travel away from his wife and high-school age children), 36 n.117 (Mr. Geisen's "income is at half its former level"), 37 (alluding to the substantial reduction in Mr. Geisen's income, his extensive travel, and the reduction in "medical insurance needed for a child's illness"). In *Siemaszko*, we referred to prejudice to the enforcement target's "ability to litigate the enforcement proceeding and prejudice to his employment interests." 63 NRC at ___, slip op. at 9-10. The NRC Staff appears to concede that Mr. Geisen suffers from the latter of those two prejudices. See Staff's Petition at 8.

²⁸ MOU, 53 Fed. Reg. at 50,319 (§ III.C.2).

²⁹ See March 27 Order at 5 (alluding to the Staff's failure "to provide *detailed and case-specific reasons* underlying a government claim that a particular factor weighs in favor of abeyance" (emphasis in original)), 42 (referring to "the paucity of particularized support for the Government's motion and strongly suggest[ing] that the Government bolster its presentation"). See also Transcript of April 11, 2006 Hearing for Oral Argument at 17-26; Transcript of March 22, 2006 Pre-Hearing Conference at 28-29.

³⁰ Transcript of March 22, 2006 Pre-Hearing Conference at 29-30, 51; March 27 Order at 5; Transcript of April 11, 2006 Hearing for Oral Argument at 5-6.

CONCLUSION

For the reasons set forth in LBP-06-13 and in today's order, we *affirm* the Board's denial of the Staff's motion to hold this enforcement proceeding in abeyance.³¹

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 26th day of July, 2006.

³¹ This ruling should not be taken as prejudgment of the merits of this proceeding.

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NUCLEAR REGULATORY COMMISSION

In the Matter of
DAVID GEISEN

(Enforcement Action)

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Docket No. IA-05-052

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-06-19) have been served upon the following persons by electronic mail this date, followed by deposit of paper copies in the U.S. mail, first class, or through NRC internal mail on July 27, 2006.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 26th day of July 2006